IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4111 of 2005

Ruksana Anwar Ganjeli .. **Petitioner**

(Orig.Plff)

V/s

1. Mr.Rasul Ibrahim Desai
2. Mr.Rajuddin Ibrahim Desai **..Respondents**

(Orig.Defts)

Shri Amit B. Borkar for Petitioner

Shri Surel S.Shah for Respondent nos.1 and 2

CORAM:S.R.SATHE,J.

DATED:22nd JUNE, 2006

JUDGMENT :-

1. As per the order passed by this Court on 16-8-2005 this writ petition is heard finally at admission stage.

2. The Petitioner, original plaintiff in Special Civil Suit NO.154 of 1996 and Respondent no.1 in Regular Civil Appeal No.278 of 2002 has filed this writ petition challenging the order passed by the 6th Ad Hoc Additional District Judge, Kolhapur in Regular Civil

Appeal No.278 of 2002 whereby the application filed by the original defendant nos.1 and 2 for amendment of the written statement was allowed.

3. The brief facts giving rise to the present petition are as under :

. The present Petitioner Ruksana A. Ganjeli filed Special Civil Suit No.154 of 1996 against the present Respondents and others for partition and separate possession of her share and also for a declaration that the decree passed in Special Civil Suit No.514 of 1990 is not binding on her and the same is void ab-initio.

4. The Special Civil Suit No.514 of 1990 was filed by one Rajuddin Ibrahim Desai, original defendant no.1 in the Special Civil Suit No.154 of 1996 for partition and separate possession of the suit property in which the present petitioner was shown as defendant no.2A while Petitioner’s mother Amirbi was shown as defendant no.3. The said suit was compromised between then plaintiff and defendant no.3. According to the present Petitioner, as per Mohammedian Law her mother had no right to act as Petitioner’s guard ian and to compromise the suit. The court had also not appointed Petitioner’s mother or anyone else as guardian. So, according to the Petitioner the decree passed in the above mentioned suit No.514 of 1990 was not binding on

her. She, therefore, filed Special Civil Suit No.154 of 1996.

5. The present Respondent nos.1 and 2 filed their written statement and opposed the suit claim. The present Respondent no.1 did not adduce any oral evidence in support of his case. After hearing both the sides and considering the oral evidence on record the Court was pleased to grant 7/8th share to the plaintiff present Petitioner.

6. Being aggrieved by the above order the defendant no.1 filed Regular Civil Appeal No.278 of 2002. During the pendency of the said appeal the Appellant and Respondent no.2 filed an application under Order 6 Rule 17 of Code of Civil Procedure for amendment of the written statement. By virtue of the said amendment the applicants original appellant and Respondent no.2 wanted to contend that amount of Rs.1 lac was kept in the name of the plaintiff in the bank and she has used the said amount after she (present petitioner) became major. However, she did not disclose this fact in her plaint. In fact as she has used the said amount, received in pursuance of the decree passed in Special Civil Suit NO.514 of 1990 she is not entitled to challenge the said decree and there is bar of estoppel by conduct. Besides this, by the proposed amendment it was also contended that the plaintiff is claiming her

rights as per provisions of the Specific Relief Act and as prayer in that behalf and relief in that behalf is discretionary and the plaintiff has concealed certain facts from the Court the said relief should not be granted to her. The aforementioned application for amendment was strongly opposed by the present Petitioner viz. original plaintiff on the ground that the proposed amendment is not necessary and the same has been made only with a view to protract the litigation and see that the present Petitioner does not get the fruits of the decree passed in her favour in Special Civil Suit No.154 of 1996 (Regular Civil Suit No.232 of 2001). It was also contended that the amendment is not bonafide and if the same is granted it will take away valuable right accrued in favour of the present Petitioner-original plaintiff. On these grounds the present Petitioner prayed for dismissal of the amendment application.

7. After hearing arguments of both sides the appellate court came to the conclusion that the Appellant the original defendant is not making out any new case and not prejudice will be caused to the present petitioner-the original plaintiff,if the amendment is allowed. He therefore allowed the amendment application.

8. Being aggrieved by the above order, the present

Petitioner has filed this writ petition. Shri Borkar, learned Advocate for the Petitioner submitted that amendment is sought only with a view to protract the litigation and the same is not necessary in order to decide the real controversy between the parties. Intention of the original defendant in filing amendment application is to get the matter remanded once the amendment is allowed and then make a request for adducing evidence as initially the defendant had not adduced any oral evidence. He, therefore, submitted that the petition be allowed and order passed by the appellate court allowing the amendment be set aside. He also submitted that the amendment will take away the valuable rights accrued in favour of the plaintiff the present Petitioner. In order to substantiate his argument the learned Advocate for the petitioner has placed reliance on a case Purshottam @ Nana U. Sanyasi V/s A.N.Jog and Ors. **2005(1) Mh.L.J. 426**. It is true that in above cited ruling it is mentioned that the application for amendment need not be allowed if made with a intention to defeat the right already accrued in favour of the other side. The said proposition is not disputed and cannot be disputed. However, from the careful reading of the above cited case it is very clear that the facts of the said case and the facts of the case in hand are quite different. In that case there was not only the question of allowing amendment to the written statement but defendant had also made

prayer for producing additional evidence by way of certain documents which could have been in fact produced by him during the pendency of the suit. As against this in the instant case the defendant has not sought production of any document. The learned Advocate for the Respondent has in fact submitted that it is not the intention of the Respondent original defendant to protract the litigation or even to adduce evidence to fill in any lacuna. He also submitted that the amendment sought will not change the nature of the initial stand taken by the defendant and defendant is in fact trying to raise certain legal issues.

9. It is needless to say that there is no impediment or bar against the appellate court permitting the amendment of pleadings so as to enable a party to raise a new plea. In fact it has been stated accordingly in Ishwardas V/s The State of M.P. and Ors. **AIR 1979 SC 551**. Of course in this very ruling the Apex Court has observed that

> All that is necessary is that the Appellate Court should observe the well-known principles subject to which amendments of pleading are usually granted. Naturally, one of the circumstances which will be taken into consideration before an amendment is granted is the delay in making the application seeking such amendment and, if

> made at the appellate stage, the reason why it was not sought in the trial Court. If the necessary material on which the plea arising from the amendment may be decided is already there, the amendment may be more readily granted than otherwise.

10. It is well settled that while considering the question of amendment it is always necessary for the Court to find out whether the amendment is taking away any valuable right accrued in favour of the other side and whether prejudice is likely to be caused to the other side. It is also necessary to see whether the amendment would enable the Court to decide the matter justly and correctly.

11. In the instant case from perusal of the original written statement Exh.55 it is very clear that the Appellant defendant has already contended in para 12 of the written statement that as per compromise, amount of Rs.50,000/- has been kept in name of the plaintiff and Rs.50,000/- in the name of the plaintiff's mother. Not only that, but Rs.50,000/- has been kept as a deposit and arrangement has been made that interest thereon would be received by the plaintiff i.e. present Petitioner and her mother at Chiplun. It is also specifically contended that as per said arrangement the Petitioner and her mother have regularly received the

interest from the bank. Thus, if we see the amendment sought, we find that the defendant is not at all making out any new case or inconsistent case. All that he has sought is that as the Petitioner has received the benefit of the above compromise after she became major, there is bar of estoppel by conduct and she is not entitled to get the reliefs sought, particularly when she concealed the fact that she has received the said amount. Thus, it is crystal clear that by the proposed amendment the Appellant original defendant has mainly contended that there is bar of estoppel by conduct for granting relief in favour of the plaintiff as she has not disclosed certain facts. So, the learned trial Judge has correctly considered all the aspects and rightly granted the application for amendment. The said amendment would definitely help the court to decide the matter justly and correctly. Considering the nature of amendment there is no question of giving any further opportunity to the Appellant-defendant to get the matter remanded and to adduce additional evidence. No new facts have been pleaded by amendment and as such defendant who has sought the amendment can not be granted chance to lead additional evidence on that ground.

12. In view of the above, it is very clear that there is absolutely no necessity to interfere with the order passed by the appellate Judge by exercising powers

under Article 227 of the Constitution of India. The petition has to be rejected.

13. In this view of the matter the petition is rejected in the above terms. Under the circumstances of the case parties to bear their own costs.

(S.R.SATHE,J)